

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Appeals for  
the Federal Circuit and the United  
States Court of International Trade

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THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

## **NOTICE**

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# U.S. Customs Service

## *Treasury Decision*

(T.D. 87-104)

### IMPORT RESTRICTIONS ON ARCHAEOLOGICAL MATERIAL FROM EL SALVADOR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of import restrictions.

SUMMARY: This document advises the public that in accordance with a request from the Government of El Salvador, restrictions are being placed on the importation of certain endangered archaeological material from El Salvador. This action, which is being taken pursuant to the Convention on Cultural Property Implementation Act and in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and in cooperation with the U.S. Information Agency, will assist El Salvador in protecting its cultural patrimony.

EFFECTIVE DATE: September 11, 1987.

FOR FURTHER INFORMATION CONTACT: Legal aspects: Samuel Orandle, Entry Procedures and Penalties Division (202-566-5765); Operational Aspects: Louis Alfano, Commercial Compliance Division (202-566-8651).

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and accompanying illegal exporting and importing.

There has been growing concern in the U.S. regarding the need for protecting endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries

where there has been recent pillaging has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of the museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub. L. 97-446, 19 U.S.C. 2601 *et seq.*). The spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. In 1983, the U.S. became the first major art importing country to implement the 1970 Convention.

It was with these goals in mind that Customs issued interim regulations to carry out the policies of the Act. The interim regulations, which were set forth in § 12.104, Customs Regulations (19 CFR 12.104), were published in the Federal Register as T.D. 85-107 on June 25, 1985 (50 FR 26193), and took effect immediately. After consideration of comments received on the interim regulations, final regulations were issued as T.D. 86-52, published in the Federal Register on February 27, 1986 (51 FR 6905), and took effect on March 31, 1986.

#### EL SALVADOR

Under § 303(a)(3) of the Cultural Property Implementation Act (19 U.S.C. 2602(a)(3)), the Government of El Salvador, a State Party to the 1970 UNESCO Convention, requested the U.S. Government to impose import restrictions on certain endangered archaeological material to assist El Salvador in protecting its cultural patrimony. Notice of receipt of the request was published by the U.S. Information Agency (USIA) in the Federal Register on April 8, 1987 (52 FR 11414).

On April 21, 1987, the request was referred to the Cultural Property Advisory Committee, which conducted a review and investigation, and submitted its report in accordance with the provisions of 19 U.S.C. 2605(f) to the Deputy Director, USIA, on July 16, 1987. The Committee found the situation in El Salvador to be an emergency and recommended that the U.S. Government impose emergency import restrictions. The Deputy Director, pursuant to the authority vested in him under Executive Order 12555 and USIA Dele-



gation Order 86-3, considered the Committee's recommendations and made his determination that emergency import restrictions be applied. (See September 11, 1987 issue of the Federal Register.)

The Commissioner of Customs, in consultation with the Deputy Director of the USIA, has drawn up a list of covered archaeological material from the Cara Sucia archaeological region in El Salvador. The materials on the list are subject to the 1970 UNESCO Convention and § 12.104, Customs Regulations. As provided in 19 U.S.C. 2601 *et seq.*, and § 12.104a, Customs Regulations, listed material from this region may not be imported into the U.S. unless accompanied by documentation certifying that the material left El Salvador legally and not in violation of the laws of El Salvador.

In the event an importer cannot produce the certificate, documentation, or evidence required in § 12.104c, Customs Regulations, at the time of making entry, § 12.104d provides that the district director of Customs shall take custody of the material until the certificate, documentation, or evidence is presented. Section 12.104e provides that if the importer states in writing that he will not attempt to secure the required certificate, documentation, or evidence, or the importer does not present the required certificate, documentation, or evidence to Customs within the time provided, the material shall be seized and summarily forfeited to the U.S. in accordance with the provisions of Part 162, Customs Regulations (19 CFR Part 162).

#### ILLUSTRATIVE LIST OF CATEGORIES OF PREHISPANIC ARCHAEOLOGICAL OBJECTS FROM THE CARA SUCIA ARCHAEOLOGICAL REGION

The following descriptions are illustrative and representative but are not intended to be exhaustive or restrictively typical.

##### *Ceramic Vessels*

1. *Miniature bottles, bowls, jars, flasks* of fine clay, cream to brown colored, sometimes with stamped or carved designs, measuring 2 to 3 inches in height.
2. *Bowls:* Low, open vessels in a variety of styles and colors usually 4 to 10 inches in diameter and 4 to 5 inches in height. Styles include:
  - Arambala polychrome, reddish brown to brown color, with glyphic and/or animal motifs and bands;
  - Salinitas polychrome, streaky cream to orange colored with black bands and designs such as spirals and animals;
  - Usulután style, a "negative" decorative technique with light color lines on a darker background; often colored cream and orange to light brown;
  - Delirio bichrome, red design on a cream surface;
  - Olocuilta monochrome, bright orange with traces of paint;
  - Lolotique monochrome, dull red decorated with finely incised lines;

*Ceramic Vessels—Continued*

- Pinos monochrome, black-brown surface usually weathered to matte appearance, fine to coarsely incised design that may have a dull red pigment rubbed in;
  - Santa Tecla monochrome, dull red sometimes with faceted shoulder;
3. *Jars*: Vessels with neck and narrow opening, sometimes with handles, usually measuring 7 to 9 inches in height. Styles include:
    - Guarumal bichrome, white dots on orange-red background;
    - Usulután style, a "negative" decorative technique, with light color lines on a darker background; often colored cream and orange to light brown;
    - Plumbate monochrome, lead grey to orange colored with metallic sheen, sometimes with effigy appliques; when tapped has a distinct ring;
  4. *Effigy Vessels*: Vessels fashioned to resemble human, animal or natural forms; usually orange, red or brown colored and 7 to 8 inches in height.
  5. *Vases*: Vessels with straight or shaped sides, sometimes stuccoed, usually 6 to 9 inches in height. Styles include:
    - Incised or molded cylindrical vase, orange to brown in color, sometimes decorated with carved geometric or naturalistic designs depicting ceremonial scenes or monkeys on cream panels;
    - Nicoya polychrome "lamp chimney" vase, white background with red, black and orange designs and black "step scrolls." Also frequently found as simple bowls with effigy supports;
    - Pear-shaped with ring base with designs in blue, yellow and red; maybe stuccoed;
    - Tiquisate, round-bottomed vase, colored cream to orange with incised designs carved on panels on each side of vase;
  6. *Plates*: Made with tripod feet or low vase, usually reddish brown or orange colored. May have painted symbolic designs in red, orange, black, blue or white of human or animal figures. Plates are usually no larger than 15 inches in diameter.
  7. *Censers*: Ladle censers with oversized handle ("frying pan" shaped) with orange or brick-red surfaces. They measure usually a little over 14 inches in length.

*Ceramic Figurines*

1. *Figurines*: Made from clay, often hollow and shaped like a bell, depicting human forms (often women elaborately adorned with headdresses and earplugs, sometimes with child in arms) or animal forms (dogs, monkeys, bats, toads, birds). Often beige to reddish brown color, sometimes with traces of colored paint. Small in size, usually under 12 inches in height. May be hand molded or made from a mold.

*Ceramic Figurines—Continued*

2. *Whistles and flutes*: Hollow clay figures, beige to brown color, shaped as animals such as birds, jaguars, dogs, or marsupials, and combining in some cases, human features.
3. *Molds*: Used to produce figurines, often show press marks and finger drags; usually brick-red in color and coarsely textured.

*Other Ceramic Objects*

1. *Drums*: Open at the top and bottom, black-brown to orange in color and sometimes incised with a medallion design; usually 8 inches in height.
2. *Effigies*: Objects fashioned to resemble natural, animal or human forms, including mushrooms, usually orange, red or brown colored and 7 to 8 inches in height.
3. *Stamp seals*: Seals designed to resemble animals (birds, reptiles, monkeys, insects) or geometric motifs; has a short spike handle on back; small in size measuring 2 × 2 inches.

*Stone Sculpture*

1. Basalmo "death" sculpture depicting a human figure with closed eyes crouching, carved from grey igneous stone; usually 12 inches in height.
2. "Hachas," or flat stones resembling a human or animal head in profile, usually 12 inches in height.
3. Relief panel resembling a jaguar head carved in relief from grey igneous stone, measuring 24 inches by 24 inches in size.

Dated: September 4, 1987.

MICHAEL H. LANE,  
*Acting Commissioner of Customs.*

[Published in the Federal Register, September 11, 1987 (52 FR 34614)]



# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao  
James L. Watson  
Gregory W. Carman  
Jane A. Restani

Dominick L. DiCarlo  
Thomas J. Aquilino, Jr.  
Nicholas Tsoucalas

*Senior Judges*

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi



# Decisions of the United States Court of International Trade

(Slip Op. 87-95)

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, UNITED  
ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, LOCAL 610,  
PLAINTIFFS V. UNITED STATES, DEFENDANT

Court No. 86-11-01409

Before CARMAN, *Judge*.

[Plaintiff's application for an order requiring the Secretary of Labor to withdraw its redetermination and allow plaintiffs' counsel access to the confidential business information contained in the supplemental administrative record granted.]

(Decided August 13, 1987)

*United Electrical, Radio and Machine Workers of America*, (Robin Alexander on the motion); *Neighborhood Legal Services Association*, (John Stember on the motion); and *National Employment Law Project*, (Elizabeth Athos on the motion) for the plaintiffs.

*Richard K. Willard*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff* on the motion) for the defendant.

## MEMORANDUM OPINION

CARMAN, *Judge*: Plaintiffs commenced this action to challenge the determination by the Secretary of Labor (Labor) denying certification of eligibility to apply for adjustment assistance. Plaintiffs seek an order requiring Labor to withdraw its redetermination of May 29, 1987 and allow plaintiffs' counsel access to the confidential business information contained in the supplemental administrative record while the matter is on remand before Labor.

Defendant contends plaintiffs are not entitled to access to the confidential business information on remand because the nature of the agency's investigation is factfinding, and the agency's own regulations prohibit disclosure of confidential information. The appropriate remedy according to the defendant is that the matter should be submitted upon briefs for review pursuant to 19 U.S.C. § 2395 after plaintiffs have obtained access to the confidential documents under an appropriate protective order.

In opposition, plaintiffs contend that Labor is to conduct an adjudication on the record after a hearing thus mandating application of the procedural safeguards of 5 U.S.C. §§ 554, 556, 557.

#### BACKGROUND

Adjustment assistance for workers and firms displaced by changes in trade policy was originally provided in the Trade Expansion Act of 1962. The assistance was believed necessary to prevent or eliminate the adverse effects on employment due to increases in imports of a given type of product. 1974 U.S. Code Cong. & Admin. News 7273. Because the provisions of this Act had not been very effective in attaining its objectives, Congress enacted the Trade Act of 1974 (1974 Act), 88 Stat. 2019 (codified as amended at 19 U.S.C. §§ 2271-2394 (1980 & Supp. 1987)). This Act was intended to provide, in an expeditious manner, maximum benefits to workers, firms, and communities effected by increased imports. The assistance was made available with "eased qualifying criteria and a streamlined petitioning process." S. Rep. 93-1298, 93d Cong., 2d Sess. 131 (1974).<sup>1</sup>

With respect to benefits for workers, the 1974 Act provides for the filing of a petition with Labor for certification of eligibility to apply for adjustment assistance. The petition may be filed by a group of workers, by their certified or recognized union, or by their duly authorized representative. Upon receipt of the petition, Labor must promptly publish notice in the Federal Register that the petition has been received and an investigation has been initiated. 19 U.S.C. § 2271(a).

The investigation is initiated by the Office of Trade Adjustment Assistance (OTAA). The director is empowered to "initiate, or order to be initiated, such investigation as he determines to be necessary and appropriate." 29 C.F.R. § 90.12 (1986).

The 1974 Act also provides for a public hearing if a request is made by a person found to have a substantial interest in the proceedings within 10 days of the publication of notice in the Federal Register. At the hearing, the interested persons are entitled to be present, to produce evidence, and to be heard. 19 U.S.C. § 2271(b). Eligibility to apply for adjustment assistance is determined in accordance with 19 U.S.C. § 2272 which provides in pertinent part as follows:

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

<sup>1</sup> Parts 2, 3, and 4 of Subchapter II of the 1974 Act were made effective until September 30, 1980. Part 2 which deals with adjustment assistance for workers has been subsequently amended to extend until September 30, 1991. See Trade Adjustment Assistance Reform and Extension Act of 1986, Pub. L. No. 99-272, 100 Stat. 304, § 13007(b) (1986).



(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

For purposes of paragraph (3), the term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.

#### 19 U.S.C. § 2272.

Similarly, Labor's regulations provide for a public hearing when an appropriate request is duly made. There are additional provisions governing the order of testimony of witnesses at the hearing, the admission of evidence, the opportunity for oral argument, and the submission of briefs. *See* 29 C.F.R. § 90.13.

It is also provided by 19 U.S.C. § 2395(a) that a worker, group of workers, certified or recognized union, or authorized representative aggrieved by a final determination may, within 60 days after notice of such determination, commence a civil action in this Court. Upon review, this Court is bound to uphold the findings of fact by Labor if supported by substantial evidence, 19 U.S.C. § 2395(b).

#### FACTS

On January 23, 1986, the United Electrical, Radio and Machine Workers of America, Local 610 (petitioners) filed a petition with Labor for certification of certain workers and former workers at the Union Switch & Signal Division of American Standard, Inc. (Company). Notice that a petition had been received was published in the Federal Register on February 11, 1986. The notice provided that interested parties could request a hearing. No hearing was held or requested.

On August 4, 1986, Labor issued a determination denying certification. 51 Fed Reg. 30446 (Aug. 26, 1986). Petitioners' request for reconsideration was subsequently denied. 51 Fed Reg. 34272 (Sept. 26, 1986).

Pursuant to § 2395(a), plaintiffs commenced this action to challenge the final determination of Labor. This Court then approved a stipulation by the parties providing for release of the confidential information contained in the administrative record filed with the Court.

After pleadings were filed, defendant learned that Labor had inadvertently failed to investigate certain of the claims set forth in the administrative petition. Defendant filed a motion for remand in order to provide plaintiffs an opportunity to be present, produce evidence, and be heard at a public hearing as provided by 19 U.S.C. § 2271(b). In granting the motion, the Court ordered that the case be remanded for further investigation, that a public hearing be held; that Labor maintain any confidential materials provided by the petitioners in the confidential portion of the administrative record;

that Labor report back the results of its investigation and determination within 45 days; and that briefs be filed thereafter.

Pursuant to the order of remand, a public hearing was held on April 16, 1987. Thirteen witnesses provided by the petitioners testified and submitted documentary evidence in support of their claims. The OTAA then wrote to the Company and requested specific responses to seven questions involving evidence raised by the petitioners at the public hearing. Labor obtained additional material by subpoena from the Company. From the record and papers filed in this case, it appears that information provided by petitioners upon remand resulted in the certification of three sections of the plant (60 out of approximately 500 workers).

It is interesting to note that in the initial investigation, the Company represented that it imported no foreign products. Record at 69. At the public hearing upon remand, however, petitioners offered evidence that not only was the Company importing a large portion of components formerly manufactured at the domestic plant, but also that the Company was attempting to conceal this fact. Supplemental Record, item 28.

In order to prepare a brief and additional affidavits in response to the Company's answers, petitioners' counsel sought to obtain copies of the confidential material from Labor. While there is some dispute as to what transpired next, it is clear that Labor refused and continues to refuse plaintiffs access to the confidential materials. Labor also refused to agree to a protective order contending that plaintiffs were not entitled to the confidential materials on the administrative level.

On June 1, 1987, plaintiffs filed an application for an order to show cause seeking access to the confidential and public portions of the agency record and an order requiring Labor to withhold its redetermination pending full consideration of plaintiffs' briefs. The Court issued the order to show cause and ordered that Labor refrain from issuing or making public its decision until such time as the Court had an opportunity to rule on the substantive issues raised by the plaintiffs' application. At the time the order was issued, the redetermination had been issued but had not yet been published in the Federal Register. In accordance with the order, Labor has not published the redetermination.

#### DISCUSSION

Defendant contends that Labor's refusal to disclose the confidential information in accordance with its regulations did not violate procedural due process since the investigation conducted by Labor is strictly one of a factfinding, non-adversarial nature. According to the defendant, this Court has not authority upon remand to supersede valid regulations of the agency and direct Labor to disclose confidential information to the plaintiffs.

In opposition, plaintiffs contend that the 1974 Act requires an adjudicatory hearing which satisfies the requirements of 5 U.S.C. §§ 554, 556, 557. More specifically, plaintiffs allege that special procedural safeguards apply in every case in which an adjudication is required by statute to be determined on the record after an opportunity for an agency hearing. Plaintiffs also strenuously maintain that they are entitled to receive and respond to all relevant evidence as a matter of constitutional due process.

Defendant contends that the facts of this case fit squarely within the holding of this Court in *Pasco Terminals, Inc. v. United States*, 83 Cust. Ct. 65, C.D. 4823, 477 F. Supp. 201, *aff'd*, 68 C.C.P.A. 8, C.A.D. 1256, 634 F.2d 610 (1980). *Pasco* involved a challenge to recover antidumping duties assessed on entries of crude or elemental sulphur from Mexico. Plaintiff, *Pasco Terminals, Inc.* contended that the Tariff Commission violated the due process rights of its parent, *Azufrera Panamericana, S.A.* in conducting the hearing by refusing the latter an opportunity to inspect a confidential exhibit for the purposes of cross-examination and otherwise restricting cross-examination. In holding that a trial-type hearing or an opportunity to confront and cross-examine witnesses was not required by due process, the *Pasco* Court asserted:

The short of the matter is that due process does not necessarily require a trial-type hearing or an opportunity to confront and cross-examine witnesses. The fact is that the differences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. E.g., *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Hannah v. Larche*, *supra*, 363 U.S. at 443-444; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Therefore, as previously indicated, when administrative agencies conduct nonadjudicative factfinding investigations, rights such as cross-examination generally do not obtain. *Hannah v. Larche*, *supra*, 363 U.S. at 445-446. Indeed, "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

83 Cust. Ct. at 78-79.

On appeal, the Court of Customs and Patent Appeals affirmed the judgment in *Pasco* holding:

The Customs Court held that: (1) The Commission's decision to receive exhibit 2 on a confidential basis was in full compliance with its own rules of practice and procedure; (2) no due process violation occurred in the course of the Commission's investigation and fact-finding hearing from its refusal to permit inspection of a confidential exhibit for purposes of cross-exami-

nation and its restriction of cross-examination of a witness; and (3) the Commission's injury determination was not arbitrary, capricious, or an abuse of discretion, nor was it contrary to law. After considering the arguments of the parties and after reviewing the record before us, we are persuaded that the Customs Court's holding is correct.

68 C.C.P.A. at 10.

Although it is true that this Court is bound by the rulings of its circuit court on questions of law, see *Zenith Radio Corp. v. United States*, 9 CIT 110, 115, 606 F. Supp. 695, 700 (1985), *aff'd*, 783 F.2d 184 (Fed. Cir. 1986), the Court finds that the questions of law in *Pasco* are sufficiently different from the issues involved in this case. Unlike the situation in *Pasco*, the plaintiffs in this case do not seek the opportunity to confront and cross-examine witnesses. Thus, the concerns evinced by the *Pasco* Court that cross-examination would disrupt the proceedings, are simply not presented in this action. Similarly, the *Pasco* Court noted that there was no statutory requirement for cross-examination or even a hearing. 83 Cust. Ct. at 78. In this case, by contrast, there can be no dispute that a hearing is required if an appropriate request is timely submitted. See 19 U.S.C. § 2271(b); 29 C.F.R. 90.13(a). At the hearing, interested persons are entitled to be present, to produce evidence, and to be heard. § 2271(b). There is also no dispute that the regulations provide for the submission of briefs. 29 C.F.R. § 90.13(g).

Assuming *arguendo* that the investigation conducted by Labor is purely of a factfinding non-adversarial nature,<sup>2</sup> the Court is persuaded that there are compelling reasons by virtue of minimal principles of procedural fairness to afford plaintiffs an opportunity to examine the confidential information in order to prepare an appropriate response. As this Court is bound to sustain the determination by Labor if supported by substantial evidence, see § 2395(b), it is incumbent upon Labor at the administrative level to consider all relevant evidence that is properly presented.<sup>3</sup> If plaintiffs cannot examine the confidential materials, they will not know what, if anything, they should endeavor to rebut. The need to examine these materials takes on even greater significance since the agency previously relied upon false confidential information supplied by the Company. As stated previously, the Company represented that it imported no foreign products when it was apparently importing large quantities of foreign components.

Defendant also argues that this Court has no authority upon remand to supersede valid regulations of the agency and order Labor to disclose confidential information to the plaintiffs. The challenged regulation provides as follows:

<sup>2</sup> Because the plaintiffs in this case do not seek the rights of confrontation and cross-examination, the Court deems it inappropriate at this time to decide whether or not the full procedural safeguards of Title 5 apply to adjustment assistance proceedings.

<sup>3</sup> This of course seems wholly consistent with the agency's own regulations which allow for the submission of briefs. See 29 C.F.R. 90.13(g). The statute also allows a hearing at which interested persons are afforded an opportunity to be present, to produce evidence, and to be heard, § 2271(b).

(b) *Information not available to the public.* Confidential business information, defined in § 90.33 of this part, shall not be available to the public.

29 C.F.R. § 90.32(b). Although the nature of the information supplied in this case is not in dispute, confidential business information is defined as follows:

(a) *Definition.* Confidential business information means trade secrets and commercial or financial information which are obtained from a person and are privileged or confidential, as set forth in 5 U.S.C. 552(b) and 29 C.F.R. Part 70.

29 C.F.R. § 90.33(a).

At the outset, the Court recognizes that it is within the agency's discretion in the exercise of its expertise to determine how it will implement the statutory mandate. If the agency's construction of a statute is reasonable, it must be sustained. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). See also *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). Indeed, as the *Pasco* Court correctly asserted: "[a]bsent constitutional restraints or extremely compelling circumstances the administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Pasco*, 83 Cust. Ct. at 78-79 (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978)).

Nevertheless, while the Court finds that the agency's regulation is reasonable, as it is apparently necessary to prevent the uncontrolled disclosure of confidential data, the regulation is simply inapplicable to the facts of this case. The regulation merely provides that confidential information shall not be available to the *public*. The Court is aware of nothing which compels the conclusion that confidential information should not be available to the *parties* of the administrative proceeding.<sup>4</sup> In view of the standard of review governing these proceedings, the compelling need to afford the parties an opportunity to examine confidential information in order to prepare a response which response is wholly consistent with the regulations, and the needs of Labor to have a proper exposition of the issues presented, the Court holds:

(1) The decision of Labor dated May 29, 1987 in Investigation TA-W-17139 is remanded for redetermination;

(2) Plaintiffs shall be afforded access to the confidential information in the supplemental administrative record while the case is before Labor;

(3) That upon receipt of the confidential information, plaintiffs shall have 15 days in which to supply a brief and any other respon-

<sup>4</sup> The Court finds it extremely significant that both the International Trade Commission and the Secretary of the International Trade Administration are empowered to issue administrative protective orders for the protection of confidential information. See 19 C.F.R. §§ 211.52, 353.30. While the Court expresses no opinion in this regard, it would seem appropriate for Labor to employ the same technique.

sive materials deemed necessary by them for due consideration by Labor;

(4) That the parties may agree upon appropriate safeguards to secure the confidentiality of the materials sought to be examined or apply to the Court for an appropriate protective order; and

(5) That Labor shall issue a redetermination and file such redetermination together with any supplemental record with the Court within 15 days from the date it receives plaintiffs' response.

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(Slip Op. 87-96)

OUTLET BOOK CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-01-00012

Before CARMAN, *Judge*.

[Plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment are denied.]

(Decided August 17, 1987)

*White & Case (David S. Klafter* on the motion for the plaintiff.

*Richard K. Willard*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Barbara M. Epstein* on the motion) for the defendant.

#### MEMORANDUM OPINION AND ORDER

*Carman, Judge:* This action was commenced to challenge the United States Customs Service's (Customs) classification of several books containing a substantial or preponderant portion of graphic or pictorial matter. Plaintiff initially sought (1) reclassification of the books; (2) refund with interest of duties paid; (3) a declaration by the Court stating that all books entering the United States are entitled to duty-free treatment; (4) a declaration by the Court enjoining and restraining defendant from classifying any books under Item 274.6040, TSUS ("Lithographs on paper: Not over 0.020 inch in thickness \* \* \* Other"); and (5) any other and further relief as to the Court may seem just and proper.

Plaintiff, now seeking relief only on its first, second, and fifth claims, moves for an order granting partial summary judgment pursuant to Rule 56 of the Rules of this Court. Defendant opposes the motion contending that there is a genuine issue of material fact, and, in the alternative, cross moves for summary judgment in its favor.

#### FACTS

In the spring of 1984, plaintiff imported into the Port of New York several shipments of books the titles of which include: *The*



*Story of Prince Charles, Boston: A Picture Book to Remember Her By, Boy George and the Culture Club, Michael Jackson, and Landscapes of America (Landscapes)*. Customs classified the merchandise as "[l]ithographs on paper: Not over 0.020 inch in thickness \* \* \* Other" pursuant to Item 274.6040, TSUS, dutiable at a rate of 6¢ per pound. Plaintiff contests this classification arguing that the merchandise qualifies as "[b]ooks not specially provided for" pursuant to Item 270.25, TSUS, thus entitling it to duty-free treatment.

After denial of its protests pursuant to §§ 514 and 515(a), Tariff Act of 1930, as amended, 19 U.S.C. §§ 1514, 1515(a); 19 C.F.R. Part 174, plaintiff commenced an action in this Court in March, 1985. By stipulation of both parties, the Government consented to reclassify pursuant to Item 270.25, TSUS, all of the above mentioned books, except *Landscapes*. Inasmuch as the Government has consented to reliquidation of the merchandise in this action, other than *Landscapes*, this motion for partial summary judgment addresses only the collection of bound reproductions known as *Landscapes*.

The dispute centers primarily on whether *Landscapes* consists of a collection of lithographs. If so, the second issue to be addressed is whether the textual portion in *Landscapes* is sufficient enough to overcome the classification pursuant to Item 274.60, TSUS ("Lithographs on paper").

#### DISCUSSION

In evaluating a motion for summary judgment, this Court must utilize the standards established by the Court of Appeals for the Federal Circuit as follows:

[S]ummary judgment \* \* \* is entirely appropriate \* \* \* where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law \* \* \*. The movant bears the burden of demonstrating absence of all genuine issues of material fact \* \* \* the \* \* \* court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in its favor \* \* \* and must resolve all doubt over factual issues in favor of the party opposing summary judgment \* \* \*.

*SRI Int'l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (citations and footnotes omitted). If a genuine dispute about a material fact exists, summary judgment must be denied. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). The primary responsibility of the court on a motion for summary judgment is to determine whether there are any factual issues to be tried. *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975); *Dan-Dee Imports, Inc., v. United States*, 7 CIT 241, 243 (1984); *Yamaha International Corp. v. United States*, 3 CIT 108, 109 (1982).

Furthermore, the existence of conflicting expert testimony indicates that there is a genuine issue of material fact. Where the affi-

ants for both parties are in direct conflict, a motion for summary judgment must be denied. *I.C.D. Group, Inc. v. United States*, 9 CIT 291, 292-93 (1985); *Scharf v. United States Att'y Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

Based upon the pleadings and affidavits submitted, this Court finds that there are genuine issues of material fact, and summary judgment is therefore inappropriate. Plaintiff contends that because *Landscapes* is produced by an offset printing process, it therefore does not contain any lithographs. Relying upon the affidavits of two experts, plaintiff maintains that there is a clear distinction between lithography and offset printing. Both affiants describe lithography as a time-consuming process requiring great skill and effort. Consequently, lithographs are considered fine art and are generally made in limited editions, often numbered, and signed by the artist. In contrast, offset books are produced by a high speed mechanical process in which the emphasis is placed on economy and volume. Therefore, offset books have very different aesthetic goals, appearances, and usages from lithographs.

Conversely, while the defendant does not dispute that *Landscapes* is a book within the broad dictionary definitions of the term, the defendant contends that *Landscapes* is more properly classifiable as a collection of bound lithographs since the merchandise is produced by employing the offset lithography process. In reliance upon affidavits submitted by its experts, the defendant maintains that works produced by the offset lithography process are recognized in the trade as lithographs. The affiants for the defendant have also identified *Landscapes* as a collection of reproductions of photo art commonly known as "lithographs," and which is produced by offset lithography.

Another factual issue raised by the parties concerns the relationship between the pictorial matter and the textual portions of *Landscapes*. In differentiating books from lithographs, Customs bases its determination upon the relationship of the text to the pictorial matter. Customs considers whether the article is essentially a collection of bound lithographs or whether it is "more than" such a collection; in other words, whether the text illustrates the pictorial matter or the pictorial matter illustrates the text. Essentially, Customs will determine whether the "primary value of the merchandise to the user is the lithographic reproductions; not the text, and thus the specific use of the merchandise is as-a collection of lithographs." Defendant's Memorandum at 27.

Plaintiff contends that the text contained in *Landscapes* discusses both the subject matter of the book and the reproductions of pictorial matter used to illustrate the text and the subject matter. According to the plaintiff the introductory text is approximately 10,000 words and fills 16 double-columned pages. Text and illustrations appear on all sides of the books' pages which are four sided folded leaves attached together by a sewn binding.



Defendant concedes that *Landscapes* contains text descriptive of the subjects. The defendant, however, disputes that the pictorial matter illustrates the text as the text illustrates the pictorial matter. According to the defendant "there is only a short sentence or two at the periphery of every two pages, identifying the two lithographs. The only other textual content consists of introductory text which does *not* describe the lithographs at all, but rather, merely discusses the scenic beauty of the United States in general \* \* \*." Defendant's Memorandum at 22. Consequently the defendant has concluded that the textual content is not sufficient enough to overcome the tariff classification under Item 274.60

It is apparent that the assertions of fact are divergent in this case. Absent a clear showing as to the relationship of the text to the pictorial matter, these motions for summary judgment cannot be granted. *I.C.D. Group*, 9 CIT at 293.

#### CONCLUSION

In light of the above, the Court concludes that the conflict of expert opinion and factual assertions leaves unresolved material questions of fact. In order to properly evaluate the competing claims, additional evidence is necessary. Therefore, plaintiff's motion for partial summary judgment is denied. Defendant's cross-motion for summary judgement is also denied.

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(Slip Op. 87-97)

ST. REGIS, PLAINTIFF V. UNITED STATES, DEFENDANT

Court No. 79-4-00673

Before RAO, *Judge*

Merchandise known as black calendared paper, imported for use as basic paper to be sensitized for use in an electrophotographic machine, qualified as paper to be sensitized for use in photography, since the term "photography" encompasses processes in which the action of light on sensitive bodies produces an image, and was properly classifiable under item 252.05, TSUS.

*Herrick & Larsen* (*Herbert Peter Larsen* at the trial and on the brief) for the plaintiff.

*Richard K. Willard*, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office (*Barbara M. Epstein* at the trial and on the brief) for the defendants.

*Soller, Singer & Horn* (*Gerald B. Horn* and *Margaret H. Sachter* on the brief) for Amici Curiae.

(Decided August 19, 1987)

**RAO, Judge:** This test case involves the proper tariff classification of merchandise imported from West Germany in 1978 and known as "black calendared paper" or "Erfurt base paper." The merchan-

dise was classified by the Customs Service of the United States (Customs) under Tariff Schedule of the United States (TSUS) item 252.90 as "paper, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated: weighing over 18 pounds per ream: other, at a duty rate of 10 per cent ad valorem.

Plaintiff claims that the merchandise is properly classifiable under item 252.05, TSUS, as basic paper to be sensitized for use in photography, at a duty rate of 1 per cent ad valorem.

The merchandise is imported in rolls and is neither sensitized nor wholly or partly covered with flock, gelatin, metal or metal solutions. After importation, it is sensitized with zinc oxide and used as a "photomaster" in a xerographic photocopy machine manufactured by Pitney Bowes.

An image is produced by first charging and exposing the sensitized paper to electromagnetic radiation and then transferring and fusing the image onto copy paper.

The process was more completely described by plaintiff's witness, Mr. Paul Wachter, an employee with plaintiff corporation, in charge of electronics communications operations. He testified that within the Pitney Bowes copy machine, a built-in light source exposes the original document in a scanning fashion. The light is reflected from the original document onto the surface of the sensitized imported merchandise in an "image-wise" fashion so that the dark or image areas of the original reflect less light to the surface of the "photomaster" than the nonprinted area of the original. The imposition of the light reflected from the original causes the charge previously placed on the surface of the photomaster to dissipate, leaving a latent electrostatic image which is not visible to the naked eye, on the surface. The image is made visible by bringing an oppositely charged ink-type particle into contact with the surface containing the latent image. This temporary image is made permanent by being transferred to ordinary, plain paper where it is then fixed by heat and made permanent.

It is this process which plaintiff claims is a process encompassed by the work, "photography," as used in the Tariff Schedules of the United States.

Defendant, besides relying on its statutory presumption of correctness, takes the position that this process is not within the definition of "photography" since the definition of this word does not include the photoelectrical process described by Mr. Wachter, but is limited to those processes where a chemical reaction is caused in the material, usually silver halide. Defendant also claims that the imported merchandise does not have the physical characteristics of paper intended by Congress to be necessary for paper classifiable as paper to be sensitized for use in photography, i.e., chemical purity and exceptional wet strength.

The question before the Court is whether the term, "photography," encompasses the process described above, i.e., xerography or electrophotography. In asserting that it does, plaintiff relies on various definitions of both these terms, found in dictionaries and scientific treatises. *Webster's Third New International Dictionary* (1961) defines "xerography" as follows (at 2644):

"xerography \* \* \* n [\* \* \*] the formation of pictures or copies of graphic matter by the action of light on an electrically charged photoconductive insulating surface in which the latent image usu. is developed with powders that adhere only to the areas that remain electrically charged and in which the image formed by the powders sometimes is transferred to a sheet of paper."

The same source provides the following definition of "photography" (at 1702):

"photography \* \* \* 1: an art or process of producing a negative or positive image directly or indirectly on a sensitized surface by the action of light or other form of radiant energy \* \* \*"

In *Van Nostrand's Scientific Encyclopedia* (1976) the term, "photography" is defined as:

"A technology in which processes and techniques are used to produce images through the action of electromagnetic radiation. The term embraces all processes employing materials sensitive to visible light, or to other forms of radiant energy, such as ultraviolet, infrared, x-ray, radiation from radio-active materials, etc."

Additionally, plaintiff relies on *Neblette's Handbook of Photography and Reprography*, 7th Edition, Ed. John M. Sturge (1977), which is recognized as an outstanding reference work on photographic technology. It describes the electrophotographic process at p. 331:

First, there must be a camera to convert the input object into an aerial image of the necessary irradiance. This image exposes an element, the photoreceptor, which has been made light-sensitive by an electrical process. Exposing the sensitized photoreceptor to an aerial image creates an electrostatic latent image on the photoreceptor. The latent image can be converted to a visible or otherwise physically detectable image by a wide variety of development methods. Finally, to have a useful output often requires manipulating the developed image in some manner. This may include, among many possibilities, transferring the image to a new support, fixing the developed image, transporting the fixed image to the user, or providing particular arrangements for viewing the image. Some systems require several additional steps, for example, cleaning, to prepare the photoreceptor for a second exposure.

*Neblette's* discusses those elements that distinguish the electrophotographic process from the silver halide process. The first is the electrical driving force, which is unique to electrophotography,

and second is the photoreceptor [the merchandise in issue]. The author goes on to say, at p. 332:

While no silver halide or gelatin is used in electrophotography, the key difference is that the electrophotographic image is electrostatic while the silver halide latent image is atomistic. Finally, development in electrophotography is a physical rather than a chemical process. For example, the latent image may be developed by attracting a light-absorbing material, called toner, to the photoreceptor by electrostatic forces, or development may be by causing these same forces to induce a physical change in a nearby material layer. Chemical reactions are never directly involved in the development step.

\* \* \* \* \*

The cameras in electrophotographic systems are similar to those used in ordinary photography. The difference is that for most copier applications it is a scanning system which is physically attached to the other subsystem to make an automated complete package.

Electrophotography is defined as photography in which images are produced by electrical means (as in xerography), *Webster's New Collegiate Dictionary*, 1st Edition (1973). The term "electrostatic printing" has been defined as a process (as xerography) for printing or copying in which electrostatic forces are used to form the image (as with powder or ink) directly on a surface.

It is the opinion of the Court that the common meaning of the term "photography" should be construed as encompassing any process in which images are produced directly or indirectly on a sensitized surface by the action of light or other form of radiant energy. In this we are guided by precedents set in various jurisdictions, as well as by the definitions cited *supra*.

The earliest case found by the Court was *City of New Orleans v. Robira*, 8 So. 402, 403, 42 La. Ann 1098, 11 L.R.A. 141 (1890), which involved the licensing of photographers. The court held:

"Photography" is defined as "the science which relates to the action of the light on sensitive bodies, in the production of pictures by the fixation of images and the like." *Webst. Dict.* It is also said to be "the art of producing images of object by an application of chemical change produced in certain substances by action of light, or more generally, by radiant energy." *Century Dict.* [Emphasis supplied]

Thus, as early as 1890, the process of producing images by an application of chemical change, e.g., silver halide photography, was recognized as being one of several possible processes within the broad definition of "photography." This broad definition for the word "photography" has been variously applied. In *States v. Matheson*, 103 N.W. 137, 138, 130 Iowa 440, 114 Am. St. Rep. 427 (1905), the court took judicial notice of the fact that "photography is the art of producing facsimiles or representations of objects by the action of

light on a prepared surface. In *Frankel v. German Tyrolean Alps*, 97 S.W. 961, 962, 121 Mo.App. 51, the court cited with approval the definition of "photography" found in *Websters Dictionary* as "the science which relates to the action of light on sensitive bodies in the production of pictures: the fixation of images and the like \* \* \*". This case was cited with approval in *Haggard v. Industrial Commission*, 223 P.2d 915, 926, 71 Ariz. 91 (1950).

More recently, the electrostatic process was described in *Advance Business Systems & Supply Co. v. S.C.M. Corp.*, 287 F.Supp. 143, 148 (1968) [Footnote 3]:

In the electrostatic process, the surface of the original, (i.e., the document or other object to be copied) is exposed to light and reflected onto an electrically charged surface. Where the light strikes the electrically charged surface, the electrical charge is dissipated and an invisible latent image is formed. The latent image is exposed to "toner", which clings to the charged areas and forms a visible image. This image is then fused to the copy paper.

The term "photography" has also been interpreted by our predecessor court in the case of *Hensel, Bruckman & Lorbacher v. United States*, 30 Treas. Dec. 814, T.D. 36419 (1916), in which the Board of General Appraisers considered the proper classification of paper used as a screen and placed between a photographic plate and an xray machine. Customs had claimed that the xray process is not photography within the common and ordinary understanding of that term. The Board held that it was, since "as a result of the operation of the xray upon the xray plate, with the aid of this paper screen and through the chemical action of light, permanent pictures or images of objects are produced \* \* \*".

The broad definition of photography was again adopted by the Customs Court, our predecessor court, in *American Mechanographic Corp et al. v. United States*, 25 Cust. Ct. 261 (1950), in which the Court cited *Websters New International Dictionary*, 2nd Edition (1948), in considering whether the film strips used to produce sound tracks for motion pictures were classifiable as photographic film:

photography, n. 1. *Photog.* the art or process of producing images on sensitized surfaces by the action of light or, more generally, of any form of radiant energy. The images produced may be either visible, in which case they must be fixed by the removal of the unchanged sensitive material, or invisible \* \* \*, when by further chemical treatment, known as development, a visible image is produced. The material used for the negative in modern photography is a glass plate, or more commonly, a transparent flexible film coated with an emulsion of silver halide suspended in gelatin. After development the unchanged silver halide is removed by solution in thiosulphate, and the fixed negative is then washed and dried. From the negative any number of positives may be printed on sensitized surfaces, which usually consist of silver chloride suspended in gelatin

and coated on paper, or, in the case of the motion-picture film, a positive film similar in composition to that used for making the negative.

In this definition the broad scope of the term is given first, followed by its application in the field of what was, in 1950, considered modern photography.

The first commercial use of a xerographic machine occurred in 1950, although experimentation with similar processes date back as far as 1777. *Neblette's, supra*, at 333. Since 1950, there has been tremendous growth in the commercial application of electrophotography, as well as the invention of totally new electrophotographic imaging technologies. *Id.* Additionally, many insights into the science and technology involved in all phases of classical electrophotography were obtained during the 1950s and 1960s. *Ibid* at 334. Thus, the commercial applications were commonly known, and assuredly technologically known, in 1962 when the YSUS was enacted, and Congress, had it considered electrophotography to be outside the scope of the term photography, could have provided separate item numbers under which papers to be sensitized for use in electrophotography would have been classifiable. Since Congress made no separate provision for such paper, even though it or similar paper used in electrophotography existed at that time, it can be concluded that Congress intended to include paper to be sensitized for use in electrophotography under the same item as that which encompasses paper to be sensitized for use in photography.

Even assuming, *arguendo*, that Congress, in 1962, was unaware of the commercial applications of the electrophotographic process and its relation to photography, it can still be concluded that the instant merchandise is classifiable under 252.05, TSUS. It is a well established principle of Customs law that tariff acts are made not only for the present, but for the future as well, thereby embracing articles produced by technologies which may not have been widely employed or known in commerce at the time of the enactment of the original provision. *Davis Turner & Co. v. United States*, 45 CCPA 39, C.A.D. 669 (1957). Since electrophotography was recognized as a form of photography at the time that the merchandise was entered (as virtually admitted by defendant's witness, Ira Seldin, when he stated that the Pitney Bowes process is a process which uses image formation through exposure to light [Tr. at 70], it can be concluded that this process was included in the term photography at the time that it became commercially feasible.

We come, finally, to defendant's argument that the merchandise does not possess the chemical purity and exceptional wet strength which Congress intended to require for paper classifiable under item 252.05, TSUS. Defendant cites the 1960 *Tariff Classification Study*, Schedule 2, Part 4, where it is stated:



Item 252.05—The provision for basic paper to be sensitized for use in photography presently dutiable at 2.5 percent ad valorem in paragraph 1450 would be continued in item 252.05 without material change. Such basic paper for photographic use can be made from either rag or chemical wood pulp and must have a high degree of chemical purity and exceptional strength when wet.

Defendant also relies on tests of purity and wet strength performed by the Customs Laboratory and the testimony of plaintiff's witness that the paper at issue does not possess these qualities to a high degree.

The 1960 *Tariff Classification Study*, prepared by the United States Tariff Commission, was specially produced for the use of the Congressional committees considering tariff proposals, i.e., the Committee on Ways and Means of the House and the Committee on Finance of the Senate. It has long been recognized as authoritative in helping courts resolve questions relating to the meaning and scope of terms which appear in tariff acts and in ascertaining congressional intent. *Textile Printing and Finishing Co., Inc. v. United States*, 49 CCPA 24, C.A.D. 789 (1962). They may and should be resorted to where a word has more than one common meaning, either of which may suitably fit the context, to determine the intent of the legislature. *United States v. Jos. Riedel Glass Works, Inc.*, 32 CCPA 201, C.A.D. 307 (1945); *United States v. Mercantil Distribuidora, S.A. et al.*, 43 CCPA 111, C.A.D. 617 (1956).

We also note that the defendant, in its brief, has asked the Court to consider definitions of the term photography that limit it to the chemical process which requires silver halide and the wet strength and purity in the paper used in that process.

However, statements in the *Tariff Classification Study* do not establish the common or commercial meaning of terms used in tariff acts. The common meaning of a tariff term is not a question of fact, but a question of law to be decided by the Court. *United States v. Floria & Co., Inc.*, 25 CCPA 292, T.D. 49396 (1930); *American Express Co. v. United States*, 39 CCPA 8, C.A.D. 456 (1951). Courts may, and do, consult dictionaries, lexicons, scientific authorities, legislative histories, and other reliable sources of information as aids to their determinations. *United States v. John B. Stetson Co.*, 2] CCPA 3, T.D. 46319 (1933).

It is the conclusion of the Court, after reviewing the definitions of the term "photography", the treatises which dealt with the development and commercial use of the electrophotographic process and the use of the broad definition of the term "photography" used by courts throughout the United States for almost one hundred years, that the broad definition of photography was intended by Congress to apply to the paper enumerated in item 252.05, TSUS. The presumption of correctness which attaches to the Customs' classification has been overcome by the evidence adduced by plaintiff at trial

and the information provided to the Court in plaintiff's and amici's briefs.

It is the determination of the Court that the imported paper is paper to be sensitized for use in photography and is properly classifiable under item 252.05, TSUS. Judgment entered accordingly.

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(Slip Op. 87-98)

SUPERIOR WIRE, A DIVISION OF SUPERIOR PRODUCTS CO., A MICHIGAN CORP.,  
PLAINTIFF V. UNITED STATES, ET AL., DEFENDANTS

Court No. 87-06-00750

[Judgment for defendant.]

(Decided August 21, 1987)

*Richard A. Kulics*, for plaintiff.

*Richard K. Willard*, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice (*John J. Mahon*) for defendants.

#### OPINION

RESTANI, *Judge*: Plaintiff, an importer of steel wire from Canada, challenges the denial of its protest against the exclusion of a shipment of wire made from wire rod produced in Spain.<sup>1</sup> The United States Customs Service (Customs) excluded the wire because it was not accompanied by certificates that would allow its entry under a voluntary restraint agreement (VRA) with Spain covering wire and wire rod.<sup>2</sup>

In connection with this action plaintiff sought a temporary restraining order and a preliminary injunction to allow it to continue importing. A temporary restraining order was granted. The order was extended to the date of the preliminary injunction hearing conditioned upon the posting of bond. Following hearing on the preliminary injunction and the merits on July 27, 1987, defendant declined to consent to the continuation of any temporary relief. The court, finding that further posting of bond was not in the interest of either party, and finding no immediate irreparable harm, declined

<sup>1</sup> Despite the caption of the case, plaintiff is the corporate entity, Superior Products Company.

<sup>2</sup> Jurisdiction to determine the protestable issue is present under 28 U.S.C. § 1581(a) (1982). Plaintiff also alleges jurisdiction under § 1581(i)(3)(4) (1982). In *Ferrostaal Metals Corp. v. United States*, 11 CIT —, Slip Op. 87-76 (June 28, 1987) the court found that in that case it was not proper to assume jurisdiction under § 1581(i) when jurisdiction under § 1581(a) was present to review a decision as to whether certificates were required by a VRA. Theoretically, it may be possible to assume jurisdiction under § 1581(a) as to protested entries and under § 1581(i) as to future entries. Jurisdiction under § 1581(i), however, is generally assumed in unusual situations, "such as when the relief available in an action brought under section 1581(a) would be manifestly inadequate or when necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies." *Ferrostaal*, Slip Op. 87-76, at 5. Citing *Lowa, Ltd. v. United States*, 6 CIT 81, 561 F. Supp. 441 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984). Thus, in cases where a party is able to pursue administrative remedies, such as those involving the denial of a protest challenging a substantial transformation decision, jurisdiction under § 1581(a) generally will be adequate. In addition to depriving Customs of the right and duty to consider the proper disposition of future entries, attempts to fashion declaratory and injunctive relief as to future entries present numerous problems. One cannot be sure that the future imports will be identical. Furthermore, the question arises as to what should be the scope or duration of the relief. Thus, except where equity demands it, relief should be limited to protested entries.



to continue the temporary restraining order. Further trial on the merits and on the motion for preliminary injunctive relief was held on August 11, 1987. The court denied preliminary relief.

#### FACTS

Plaintiff has been importing wire made from Spanish hot-rolled wire rod since late 1984. It obtains the finished cold-drawn wire from its related company, Big Point Steel Company, in Ontario, Canada. It is the operations of Big Point which are the main focus here.

The evidence discloses that plaintiff orders the wire rod from Spain for delivery to Canada. The rod arrives in coils of about 2,700 pounds each. The rod is uncoiled, and cleaned during passage through a mechanical descaling machine, which removes a hard oxide crust by reverse bending. The scale is formed during the rod-making process and must be removed to prevent damage to the wire-drawing equipment. The rod is then coated with a spray-on lubricant/rust preventative. The coils are joined by butt-welding, to facilitate feeding the dies, and because the end product is a 2,000 pound coil. Generally, the butt-welding process may also involve annealing across the joint so that the composition of the wire will be the same throughout. There was no testimony as to whether annealing took place at Big Point.

The operation crucial to resolution of this matter is the process which turns the wire rod into wire. In order to feed the machine which contains the dies that cold draw the rod into wire, the rod must be pointed and inserted into the machine. The rod is drawn through one, two and possibly, in a few cases, three dies. The testimony was contradictory as to whether one or two die passes were most commonly needed for the sizes of wire drawn by plaintiff, but plaintiff's witnesses seemed to have more familiarity with the process and the court accepts their testimony that two die passes are normally involved. Testimony also indicated that this process increases the tensile strength by thirty to forty percent as the rod is reduced in cross-sectional area by about thirty percent and is elongated. Other evidence indicated this degree of strength increase may be slightly high, but it is not greatly overstated. The final result is a substantially stronger product, which is also cleaner, smoother, "less springy," less ductile, and cross-sectionally more uniform.

Seventy percent of the wire imported by plaintiff is intended for use in making wire mesh for concrete sewer pipe reinforcement, which requires the strength of the finished wire. Twenty percent of the wire imported by plaintiff is sold as wire. The wire has about one dozen applications, such as shelving or decking and baskets used in the automotive industry. Wire rod has few uses except for making wire. Only a very small percentage of rod is used directly in concrete reinforcement.

The wire rod is of low carbon content. It is referred to as industrial quality or mesh quality rod. The rod is purchased by plaintiff for its affiliate from the Spanish producer in six sizes which range from 7/32 of an inch to 7/16 of an inch. The sizes of rod imported produce a range of sizes of wire, but the physical properties of the rod limit the range of sizes of wire which may be effectively or economically produced from a particular size of rod. It is also the chemical content of the rod and the cooling processes used in its manufacture determine the properties that the wire will have after drawing.

Production of finished cold drawn from raw materials, such as scrap metal, involves several processes. The first step is to produce a steel billet. The particular process described at trial was that utilized by a domestic wire rod producer.<sup>3</sup> There was no testimony indicating that the process used to produce the wire rod at issue was significantly different. The billet is a piece of steel about fifty feet long and five and one-eighth inches on each side, if measured cross-sectionally. Depending on the desired composition of the rod to be produced, a selection of different types of scrap are chosen. The scrap is melted in an electric furnace at 2700° Fahrenheit. The molten metal is refined by adding lime, oxygen, and possibly other additives to remove impurities. After the impurities are removed the steel is poured into a ladle and then into a tundish (a brick lined, steel container with holes). The steel then flows into a caster and the billets are formed. The testimony indicated that the scrap costs about one hundred dollars per ton, and at an efficient plant the making of a billet costs about the same.

The next step is the production of wire rod from billets. The billet is reheated to 2100° F. The rod mill described involves twenty-five separate rolling stages (stands) and two lines of billets can be processed at once. The first seven stands are called the roughing stage. The hot billets are passed through horizontal stands which gradually remove the corners of the billets to achieve a more cylindrical shape. The next four stands are also horizontal and are called the intermediate stage. The third stage also involves four stands but they are alternately horizontal and vertical. Finally, ten carbide rolls size down the rod into its final form. The process is computerized and moves at high speed so that water cooling is required to keep friction from raising the temperature above 2100°. The rod coils produced are then laid out with certain spacing depending on the rate of cooling needed. Air blowers can increase the cooling, and the use of hoods can decrease it.

The testimony indicated that the rolling mill cost between sixty and one hundred million dollars and a new mill would cost perhaps four times that amount. The testimony also indicated that much smaller operations are not economically feasible. The domestic producer's rolling operation involves one hundred and twenty-five em-

<sup>3</sup> The domestic rod producer filed an *amicus* brief which the court accepted.

ployees and another sixty employees for quality control. The cost of producing one ton of rod from billet was placed at between forty and eighty dollars, depending on efficiency.

Testimony at trial indicates that a cold-drawing facility can be established for less than two hundred fifty thousand dollars. Plaintiff's operation seems within that range. A used drawing machine may be purchased for as little as thirty-five thousand dollars. Testimony indicated that three employees are needed to run a cold-drawing machine. Plaintiff operates its Canadian plant around the clock five days per week. Plaintiff's accountant stated that recent figures indicated that the cost of cold-drawing the wire from wire rod was about thirty-six dollars per ton. This figure has not been challenged seriously by defendant, and there was some evidence indicating that the figure is slightly understated if viewed in relation to a more general assessment of cost. In early 1987, the price of wire from Big Point to its affiliate was about two hundred eighty dollars per ton. Plaintiff paid two hundred thirty-five dollars per ton for the Spanish rod during the same period.

There seems to be agreement between the parties that the value added in terms of cost of the drawing process is about fifteen percent. During the relevant period domestic wire rod could be purchased for about three hundred dollars per ton. Also during this period, plaintiff sold wire at a substantially higher price to independent customers than it did internally.

Wire rod cannot be hot-rolled to a sufficiently round state to meet specifications of wire. To those in the steel and wire industries, wire rod and wire are different products. They are also classified differently for tariff purposes.

#### ARGUMENTS

Plaintiff raises two arguments. It asserts that the wire rod was substantially transformed in Canada into wire so that the product it seeks to import is a product of Canada, not Spain, and therefore is not covered by a VRA. Plaintiff also asserts that Customs' action regarding the shipment at issue represented a change in position resulting in a restriction, which change may not take place without notice and opportunity for comment, pursuant to 19 C.F.R. § 177.10(c)(2) (1986).

Defendant argues that the operations performed in Canada were minor and that the court should consider the purpose of the VRA and find that the wire is a product of Spain not Canada. Defendant also argues that Customs did not take a "position" within the meaning of § 177.10(c)(2), and thus no opportunity for comment is required.

#### EXISTENCE OF A "POSITION"

Two opinions of this court have treated directly the issue of the existence of a position for purposes of § 177.10(c)(2). *National Juice*

*Products Ass'n v. United States*, 10 CIT —, 628 F. Supp. 978 (1986); *Arbor Foods, Inc. v. United States*, 9 CIT 119, 607 F. Supp. 1474 (1985). In *National Juice* the court found a "position" to exist, based on the existence of several rulings published in the Customs Bulletin that provided a factually explicit description of a Customs position of at least eight years standing. *Arbor Foods* reached the opposite result, finding that "a series of ruling letters, oral assurances from various Customs officials, and remissions of liquidated damages claims" did not constitute a position, where the exact merchandise was not covered by a ruling letter. 607 F. Supp. at 1478.<sup>4</sup>

The court finds the situation at hand more akin to that described in *Arbor Foods* than to that described in *National Juice*. Here there was one ruling letter, vaguely describing a wire-making process in Mexico and finding substantial transformation for purposes of the law relating to the Generalized System of Preferences (GSP). No. 553052 CW (Aug. 20, 1984). This letter ruling was only available to the public via microfiche, an indication that Customs did not consider the ruling letter to be of widespread applicability. Rulings of broad precedential value are generally published in the Customs Bulletin, as were those in *National Juice*. The letter ruling at issue is a "precedential" decision, which must be made otherwise "available for public inspection." 19 C.F.R. § 177.10(a). It need not be published in the Customs Bulletin.

Publication in the Customs Bulletin has dramatic effects in some areas. For example, rates of duty may not be raised beyond the rates published in the Customs Bulletin, without notice and opportunity for comment. 19 C.F.R. § 177.10(b) & (c)(1). Although 19 C.F.R. § 177.10(c)(2), regarding restrictions of imports, does not refer directly to publication of rulings in the Customs Bulletin, the court in *National Juice* found such publication important to its analysis of whether Customs had established a "position" that could not be revoked without notice under the terms of § 177.10(c). 628 F. Supp. at 994.

Plaintiff had the option of obtaining its own letter ruling, which would have given it the right to notice before a change. 19 C.F.R. § 177.9(c). Plaintiff did not avail itself of this mechanism but chose to rely on a cryptic letter directed to another. In sum, the letter ruling at issue was neither sufficiently descriptive to be broadly applied, nor was it clearly adopted as the position of Customs regarding merchandise of the type sought to be imported by plaintiff under the circumstances in which plaintiff sought to import it.

Plaintiff also cites the fact that the local Customs officials acquiesced in similar importations for more than two years, relying in part on the letter ruling. Such actions did not establish a "position" in *Arbor Foods*, and they do not suffice here. As no "position" had

<sup>4</sup> In *Arbor Foods*, the court went on to state that "Customs' establishment of a 'position' would be along the same lines as that of an 'established and uniform practice' under 19 U.S.C. § 1315(d) (1982)." 607 F. Supp. at 1478. The court does not read this to mean that a "position" is the same as an "established and uniform practice." Customs certainly could have used this term of art if that is what it meant by its regulation.

been established for purposes of § 177.10(c)(2), defendant is free to exclude plaintiff's merchandise immediately, if the substantive law permits.

#### SUBSTANTIAL TRANSFORMATION

The basic issue before the court is whether the wire sought to be imported is a product of Spain or of Canada for purposes of enforcing the VRA. The parties agree that the court should make its determination on the basis of whether the wire rod imported from Spain is substantially transformed in Canada. This was the standard recently applied to such questions in *Ferrostaal Metals Corp. v. United States*, 11 CIT —, Slip Op. 87-76 (June 26, 1987), in which the court found that Japanese export certificates need not be provided for cold-rolled steel sheet which was subjected to a hot-dip galvanizing process in New Zealand.

There is, however, a preliminary dispute as to whether the court may consider the purpose of the VRA in making its decision as to whether a substantial transformation occurred. In *National Juice*, 628 F. Supp. at 988-89 n.14, the court indicated that as the concept of substantial transformation arises in several contexts under the customs laws, differing statutory language or purposes might vary the results in cases involving the issue of substantial transformation. At issue in that case was the country of origin of orange juice products for marking purposes. The court found cases discussing substantial transformation in the context of marking most directly applicable, although the court relied on cases applying similar standards in other areas. Similarly, in *Torrington Co. v. United States*, 764 F.2d 1563, 1571 (Fed. Cir. 1985), the court indicated it was "keeping in mind the GSP's fundamental purpose of fostering industrialization in [beneficiary developing countries] \* \* \*" in making a substantial transformation decision regarding the production of needles.

In this case there is no statutory language or legislative purpose which will directly guide the court. The Executive branch may negotiate voluntary restraint agreements. 19 U.S.C. §§ 2111-2213 (1982 & Supp. III 1985). The President may also enforce such agreements relating to steel products by requiring export licenses. Steel Import Stabilization Act, § 805, 19 U.S.C. § 2253 note (Supp. III 1985). Although § 803 of the Steel Import Stabilization Act indicates a Congressional desire that a specific market share be obtained by United States industry, a bilateral agreement involves more than the ultimate goals of the United States. The agreement, being the product of negotiation, contains terms balancing various interests. The court has no way of attributing an overriding purpose to the VRA at issue in a manner that can guide the court's decision here. The VRA has no terms which define the standard applicable to a determination of whether the product imported is the product of the signatory country so as to trigger the requirement of a certifi-

cate. Thus, to the extent it is possible, the court must seek a neutral standard, unaffected by specialized statutory purpose, to determine the country of origin of the merchandise at issue. *Cf. Ferrostaal*, Slip Op. 87-76, at 11 ("multiple standards in these cases would confuse importers and provide grounds for distinguishing useful precedents"); *Cardinal Glove Co. v. United States*, 4 CIT 41, 44 (1982) (language of bilateral textile agreement must be given construction consistent with language in tariff laws).

The court now turns to the fundamental question of whether under generally applicable precedent a substantial transformation of the wire rod from Spain occurs when it becomes wire, so as to make the wire a product of Canada, and thus not subject to VRA restrictions. The basic test cited by the parties was set forth in a drawback case, *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908), which held that a product would be considered the manufacture or product of the United States if it was transformed into a new and different article "having a distinctive name, character or use." The test has been applied in various situations. Cases giving rise to the most generally cited precedent are those involving country of origin for marking purposes, application of the GSP, and drawback. In addition, the parties have cited two important restriction cases which apply the same basic test. *See Ferrostaal*, Slip Op. 87-76, at 7; *Cardinal Glove*, 4 CIT at 45.<sup>5</sup>

Although all recent cases cite the *Anheuser-Busch* test, they apply it differently, and modify it somewhat. A name change, for example, is not always considered determinative. *United States v. Int'l Paint Co.*, 35 CCPA 87, 93-94, C.A.D. 376 (1948). Therefore, although it is clear that a name change from "wire rod" to "wire" occurred here, this fact is not necessarily determinative. It may support, however, a finding of substantial transformation, as it did in *Ferrostaal*. Likewise the change in tariff classification which occurred here (*see United States v. Kanthal Corp.*, 64 CCPA 89, 91, 554 F.2d 456, 457 (1977)) is not dispositive, although it also may be supportive. *Belcrest Linens v. United States*, 741 F.2d 1368, 1372-73 (1984).

In recent years the courts have concentrated on change in use or character, finding various subsidiary tests appropriate depending on the situation at hand. An inquiry that is sometimes treated as a type of cross-check or additional factor to be considered in substantial transformation cases is whether significant value is added or costs are incurred by the process at issue. *See United States v. Murray*, 621 F.2d 1163 (1st Cir.) (blending of glues added no significant value), *cert. denied*, 449 U.S. 837 (1980). In *National Juice*, values of between one and eight percent were not found to be significant. 628

<sup>5</sup> Although *Cardinal Glove* purported to apply the "country of exportation" test to the merchandise at issue, it appears that the court's analysis also encompassed the factors outlined in *Anheuser-Busch*. The court's use of the term "country of exportation" in *Cardinal Glove* has been a source of controversy. *See* T.D. 82-169, 16 Cust. B. & Dec. 471 (1982); T.D. 84-171, 18 Cust. B. & Dec. 490 (1984). In the case at bar, the parties agree that the test set forth in *Anheuser-Busch* provides the proper legal standards.



F. Supp. at 990. In *Uniroyal v. United States*, 3 CIT 220, 223-24, 542 F. Supp. 1026, 1029 (1982) *aff'd* 702 F.2d 1022 (Fed. Cir. 1982) (addition of outer sole did not substantially transform shoe upper under marking laws), no percentage was specified, but the cost of the alleged transformation was deemed insignificant. 542 F. Supp. at 1029-30. In *Ferrostaal*, on the other hand, a value, attributable to the transformation of at least thirty-six to nearly fifty percent of the value of the heat treated steel, reinforced the court's conclusion that galvanizing and annealing steel constituted a substantial transformation. Slip Op. 87-76, at 16.

A value added test has appeal in many situations because it brings a common sense approach to a fundamental test that may not be easily applied to some products. The fifteen percent added value figure for the wire standing alone does not pull in either direction, but related concepts, including the amount of labor required to accomplish the change and the capital investment required relative to that required to produce the entire article, are also relevant to a determination of whether the change involves minor processing. Minimal processing is part of the factual background of cases such as *Murray*, *National Juice* and *Uniroyal*, all of which involve findings of no substantial transformation. The differences in capital investment and labor needed in the production of wire rod versus wire are enormous. Comparing only the production of wire from wire rod, versus the production of wire rod from billet, it becomes apparent that the processing performed in Canada is a minor finishing step which may be accomplished easily anywhere with a minimal amount of effort and investment.<sup>6</sup> By itself such analysis may not provide the entire answer as to whether a substantial transformation has taken place, but it should comprise part of the analysis in a case involving the type of products and processes at issue here.

Turning to past precedent, the court observes that cases dealing with substantial transformations are very product specific and are often distinguishable on that basis, rather than by their statutory underpinnings. It is difficult to generalize from cases involving combinations of articles to those that involve processing of a single material. In addition, it is frequently difficult to take concepts applicable to products such as textiles and apply them to combinations of liquids or fabrication of steel articles. To determine whether the goods at hand are substantially transformed for purposes of VRA enforcement, the court should examine cases involving processing of metal objects without combination or assembly operations. *Torrington Co. v. United States*, 764 F.2d 1563 (1985) is one such case. As indicated, it involved the manufacture of needles in a beneficiary developing country. In the first stage of production of needles, a wire is straightened, cut, beveled, and drawn to form a needle

<sup>6</sup> The court excludes from this comparison the requirements of producing billet from raw material. Because the wire rod is clearly a different product, which involves a substantial transformation from billet, the better approach would seem to be disregard of the earlier stage.

blank. The blank is only useful in the needle-making process. In the next stage, an eye is struck into the needle, a groove is made for thread, and the needle is finished by various processes, including hardening, sharpening, and polishing. The *Torrington* court found that in order for plaintiff to prevail under the GSP statute, two substantial transformations were necessary; the court found both the first and second stages to be substantial transformations.

The second stage of processing discussed in the *Torrington* case involved a transformation from producers' to consumers' goods. The *Torrington* court cited with approval the case of *Midwood Indus. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (1970), in which rough forgings of the approximate dimensions of the finished products were found to be substantially transformed after being cut, tapered or trimmed, beveled, bored, and subjected to other finishing processes in order to create pipe flanges and fittings. The producer to consumer goods distinction drawn in *Midwood*, a marking case, however, was found not determinative as to substantial transformation in shoe construction in another marking case, *Uniroyal*. Although some of the processes involved here are the same as those involved in the second phase of *Torrington*, there is no clear change from producers' to consumers' goods. Wire rod is primarily intended for wire production, which, in turn, is primarily intended to be used for making wire mesh for concrete pipe reinforcement.

The processes involved in the first stage of *Torrington* are closer to the ones involved here. In fact, the *Torrington* court cited in support if its holding a Treasury Decision involving use of dies to draw plate steel into a cup-shaped rear engine housing. See *Torrington*, 764 F.2d at 1569 (discussing T.D. 78-400, 12 Cust. B. & Dec. 875 (1978)). Two factors distinguish this aspect of *Torrington* from the case at hand. First, once the needle blanks were drawn they were fit for only one purpose; the raw material was then destined for one end use. This type of transformation does not occur when wire rod is drawn into wire. The composition of the wire rod determines what uses the wire may have. Although the steel and wire industries may have different names for the products, wire rod and wire may be viewed as different stages of the same product. The difference in stages may be important for tariff purposes but it is not determinative here. In contrast, the *Torrington* court stated, "the initial wire is a raw material and possesses nothing in its character which indicated either the swages [blanks] or the final product." *Torrington* at 1568. Here, the wire rod dictates the final form of the finished wire. Second, the court cannot escape the statutory basis of the *Torrington* opinion. Apart from direct references to the purpose of the GSP already mentioned, the court also noted, "\* \* \* *Torrington Portuguesa* could do no more than it already does in the production of needles. In these circumstances we think Congress intended the GSP statute to apply." *Id.* at 1571.



The engine housing decision cited by *Torrington* also differs from the case at hand. Like the wire to needle blank change, the product was transformed from basic steel into a part with a unique destiny. In addition, the decision noted the involvement of a series of dies. Essentially only two die passes are involved here. The wire emerges stronger and rounder after the passes, but the wire loses a few other advantages, such as greater ductility, in the process. It looks much the same. Its strength characteristic, which is important to its end use, is altered, but the parameters of the strength increase was metallurgically predetermined in the creation of the steel billet and very specifically through the fabrication of the wire rod. Under these circumstances the court does not find a significant change in use or character to have occurred.

The court should also mention here the *Ferrostaal* case. The hot-dipped galvanizing processes involved there, which involved substantial chemical changes, were different from the cold drawing processes involved here. Although, applying broader analytical concepts, the changes in use and character were not greatly different from those involved here, the value added was significant. It appears that a larger capital investment, as well as possibly significant labor, was required to accomplish the transformation in *Ferrostaal*. Taken together these differences are sufficient to distinguish *Ferrostaal* from the case at hand.

Here only the change in name test is clearly met, and such a change has rarely been dispositive. No transformation from producers' to consumers' goods took place; no change from a product suitable for many uses to one with more limited uses took place; no complicated or expensive processing occurred, and only relatively small value was added. Overall, the court views the transformation from wire rod to wire to be minor rather than substantial. Accordingly, the country of origin of the wire must be considered Spain rather than Canada.

Judgment is entered for defendant.

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(Slip Op. 87-99)

INTERNATIONAL COMPONENTS CORP., PLAINTIFF V. UNITED STATES, DEFENDANT

Court No. 79-12-01796

Before RE, Chief Judge.

OPINION AND ORDER

Fractional horsepower direct current electric motors used for intermittent use in consumer and hardware appliances were classified by Customs Service as motors "under 1/40 horsepower" under Item 682.25 of the TSUS. Plaintiff contests the clas-

sification, claiming that the merchandise is properly classifiable under item 682.30, TSUS, as motors of 1/40 or more but not over 1/10 horsepower.

*Held:* Since the imported motors were incapable of consistently producing 1/40 horsepower during customs testing, they were properly classified under Item 682.25 of the TSUS.

[Judgement for defendant; action dismissed.]

(Decided August 25, 1987)

*Mandel & Grunfeld (Steven P. Florsheim), for plaintiff.*

*Richard K. Willard, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (Paula N. Rubin), for defendant.*

**RE, Chief Judge:** The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the customs invoices as "fractional horsepower direct current permanent magnet motors."

The merchandise was classified by the Customs Service as motors "of under 1/40 horsepower," under item 682.25 of the Tariff Schedules of the United States (TSUS). Consequently, it was assessed with duty of 12.5 per centum ad valorem.

Plaintiff protests this classification, and contends that the imported merchandise is properly classifiable under item 682.30, TSUS, as motors "of 1/40 or more but not over 1/10 horsepower," dutiable at a rate of 6 per centum ad valorem.

The pertinent statutory provisions of the tariff schedules are as follows:

*Classified Under:*

Schedule 6, Part 5:

Generators, motors, motor-generators, converters (rotary or static), transformers, rectifiers and rectifying apparatus, and inductors; all the foregoing which are electrical goods and parts thereof:

Motors:

Of under 1/40 horsepower:

\* \* \* \* \*

682.25 Other..... 12.5% ad valorem

*Claimed Under:*

682.30 Of 1/40 or more but not over  
1/10 horsepower ..... 6% ad valorem  
(modified by TD 68-9)

The question presented is whether, within the meaning of the competing tariff provisions, the imported merchandise is dutiable as "Motors Of under 1/40 horsepower," as classified by Customs, or as "Motors: Of 1/40 or more but not over 1/10 horsepower," as claimed by plaintiff. In order to decide this issue, the court must consider "whether the government's classification is correct, both

independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F. 2d 873, 878, *reh'g denied*. 739 F. 2d 628 (Fed. Cir. 1984).

After an examination of the merchandise, the exhibits, the testimony of record, and the relevant case law, it is the determination of the court that plaintiff has not overcome the presumption of correctness that attaches to the government's classification, and that the imported merchandise was classified correctly. See 28 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed Cir. 1984); *E.R. Hawthorne & Co. v. United States*, 730 F.2d 1490, 1490 (Fed. Cir. 1984).

The imported merchandise consists of small electrical motors which are capable of producing fractions of a horsepower. These motors are used in appliances such as hairdryers, cookie guns, rechargeable grass shears, tape drivers, and emergency flashing lights.

To redress a lack of uniformity in the testing of fractional horsepower electric motors and to ascertain the capable horsepower of each motor, Customs developed a uniform test based on maximum output. The test requires that, for fractional horsepower motors in the class of less than 1/20 horsepower, the horsepower shall be the maximum output horsepower the motor will produce for a period of 5 minutes during which the temperature of the motor does not increase to a value which causes permanent injury to the motor.

The implementation of this test by Customs involves a two-step procedure. First, there is a screening test in which the motor is coupled to a dynamometer which applies the requisite degree of torque to the motor, and measures its speed in revolutions per minute (RPM). During this screening test, Customs starts the motor at a very low voltage and torque, and gradually increases the levels until the motor achieves 1/40 horsepower of output. If the motor does not reach 1/40, or is damaged in the attempt, it is classified as a motor under 1/40 horsepower, under item 682. 25, TSUS. If the motor reaches 1/40 horsepower during the screening test, it is stopped and allowed to cool. The motor is then subjected to a second procedure, a 5-minute test using the torque and voltage levels calculated to allow the motor to reach 1/40 horsepower during the screening test.

Plaintiff does not challenge the maximum output test as a whole, but, rather, alleges that the two-step procedure used in implementing the test was inadequate, and produced erroneous results. Specifically, plaintiff alleges that Customs did not test samples from its shipment, that tests of identical motor models produced inconsistent and inaccurate results, and that Customs' methods and training techniques were insufficient and imprecise.

At trial, plaintiff called two witnesses familiar with the testing of fractional horsepower electric motors. Mr. James L. Gaza, president of plaintiff corporation, testified that he tested and supervised the

testing of the imported Igarashi motors, using the method developed by Customs with minor, but critical, variations. He asserted that, in all instances, the nine motor models in issue were capable of producing 1/40 horsepower or more.

In discussing his departures from Customs' procedures, Mr. Gaza stressed the importance of proper alignment between the shaft of the motor and the dynamometer. He testified that excess torque on the motors created by any misalignment would decrease their horsepower capability. To insure precise alignment between the motor and the dynamometer, Mr. Gaza used an ammeter. This device measures the voltage input necessary to make the motor spin. Mr. Gaza explained that he would measure the voltage input before and after coupling to the dynamometer. If the voltage varied by more than 1 or 2 percent, he would know that proper alignment had not been achieved, and would repeat the process.

Mr. Gaza criticized the "Lord" coupling device which was used by Customs to connect the shaft of the motor to the shaft of the dynamometer. He recommended a flexible coupling, such as the coupling manufactured by Igarashi, to compensate for any misalignment. Mr. Gaza also criticized the screening procedure used by Customs, and stated that customers for the motors were concerned with the lifespan of the motor at a given voltage, and not with its horsepower capability.

Mr. Gaza stated that the motors have a manufacturing tolerance of plus or minus 10 percent which would make the voltage necessary to produce 1/40 horsepower vary from motor to motor. However, he denied that this would result in different horsepower capabilities among motors. Instead, he claimed that, in determining voltage and torque levels to be applied in the screening test, Customs should incorporate the manufacturing tolerances into their calculations by measuring voltage and torque parameters based on one-half of the motor's loadpoint. He added that the procedure used by Customs of gradually increasing torque and voltage levels until 1/40 horsepower was reached could damage the motor by causing it to stall.

In support of its argument, plaintiff introduced into evidence certain exhibits consisting of customs laboratory reports of tests performed on the motor models in question. These reports showed that various laboratories had achieved different results in classifying these motors according to their horsepower rating. Specifically, plaintiff points to two situations in which motors that were originally classified as incapable of reaching 1/40 horsepower were found to be capable of reaching over 1/40 horsepower upon retesting. Mr. Gaza opined that if voltage was varied to compensate for manufacturing tolerance, all of the motors would be capable of producing 1/40 horsepower or more, and that the inconsistent results were caused by the erroneous procedures of Customs, and not by variance among the sample motors. Moreover, he claimed that, to

produce proper results from this test, a minimum of 10 samples were necessary.

Plaintiff's second witness, Mr. Christian C. Peterson, an employee of Polaroid Corporation and a user of fractional horsepower motors manufactured by Igarashi, testified that he has been responsible for design, development, and testing of fractional horsepower motors for Polaroid since 1970. His experience in training personnel in testing procedures caused him to conclude that proper training required several weeks of instruction. Mr. Peterson also emphasized the importance of the alignment and coupling process in the testing procedure, and supported Mr. Gaza's use of an ammeter and flexible coupling device to insure proper readings.

Mr. Peterson also criticized the screening procedure employed by Customs. He agreed with Mr. Gaza's use of a loadpoint in calculating torque and voltage levels, and believed that the 5-minute test should vary voltage to permit the motor to run at a constant speed. In addition, Mr. Peterson stated that he preferred using 10 samples to allow for bearing malfunctions and other problems unrelated to the horsepower capability of the motors.

Rather than to rely merely on the statutory presumption of correctness that prevails in customs classification cases, the defendant submitted credible and reliable evidence to support its contention that the merchandise was properly classified by Customs. See *NEC America, Inc. v. United States*, 8 CIT 184, 190-91, 596 F. Supp. 466, 471 (1984), *aff'd*, 760 F.2d 1295 (Fed. Cir. 1985).

The defendant's witness, Mr. Cecil I. Clements, Chief of the Operations Branch, Technical Services Division of the United States Customs Service, testified that he developed the customs test for fractional horsepower direct current electric motors, and was responsible for the training and supervision of customs personnel in the performance of the test. He explained that the test was based on maximum horsepower output for a controlled period of time because most of the motors in question were not designed for continuous use. He testified that the 5-minute test was patterned directly on the minimum time test recommended and used by the National Electric Manufacturing Association. The validity of the test was further supported by independent laboratory research and suggestions solicited from manufacturers and importers in the field, including International Components Corporation and Igarashi.

Mr. Clements refuted the allegations made by plaintiff's witnesses pertaining to the customs alignment procedures. He stated that the "Lord" coupling device used by Customs was as good, if not better, than those suggested by plaintiff. He stressed that Magtrol, the manufacturer of the dynamometer used by both Customs and International Components Corporation in their testing, expressly recommended the "Lord" coupling device for use with its dynamometer. Mr. Clements also emphasized that the alignment procedure used by Customs was entirely adequate, and that Magtrol did not

recommend use of an ammeter in aligning a motor to its dynamometer.

Mr. Clements explained the screening test used by Customs, and rejected the assertions made by plaintiff's witnesses which related to the calculations of torque and voltage levels to be applied during this phase of testing. Mr. Clements found these claims to be irrelevant since the torque and voltage levels applied during the screening test were slowly increased until the motor reached 1/40 horsepower. He indicted further that the motors were never taken to their stall point unless they were incapable of producing 1/40 horsepower of output. Mr. Clements stressed that any inconsistent results among customs laboratories were due to the limited capacities of the motors, and not the testing procedures utilized by Customs. He concluded that, in his experience, six samples were sufficient to determine maximum horsepower output for fractional horsepower electric motors using Customs' 5-minute test.

While the tests performed by Mr. Gaza may have indicated a 1/40 horsepower capability, the procedure and equipment that he used deviated from the test established by Customs. The customs test procedure was closely patterned on the one now used by the National Electric Manufacturing Association, and utilized the coupling specifically recommended by the manufacturer of the dynamometer. Plaintiff used a flexible coupling and added an ammeter to its test procedure, claiming its method to be superior. Defendant's witness refuted this claim, and testified that the customs procedure was as good as, if not better than, plaintiff's.

The evidence indicates that Customs made a reasonable, good faith effort to test the motor's horsepower capability through a fair and accurate procedure. Specific thought was given to the various problems raised by plaintiff, and a testing procedure was developed to test these types of motors accurately and fairly. Plaintiff's basis for its modifications of the procedure is based solely on the testimony of its witness. The opinions of plaintiff's witnesses were not only contrary to the method already in place and used by Customs, but they were also contrary to the methods recommended by the manufacturer of the equipment as well as the National Electric Manufacturing Association. While expert testimony on scientific or technical matters may be persuasive, "[i]t is well established that conclusory statements by a witness which are based solely on his own opinion have little or no probative value." *NEC America, Inc. v. United States*, 8 CIT at 190, 596 F. Supp. at 471; see also *Keer, Maurer Co. v. United States*, 46 CCPA 110, 115, C.A.D. 710 (1959); *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. 11, 22-23, C.D. 4783, 468 F. Supp. 1318, 1325, *aff'd*, 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979).

In support of its assertion that it has presented "*prima facie*" evidence to rebut the presumption of correctness that attaches to the government's classification of the imported merchandise, plaintiff



cites *Aluminum Company of America v. United States*, 60 CCPA 148, C.A.D. 1102, 477 F.2d 1396 (1973).

In the *Aluminum Company* case, plaintiff challenged the classification of imported fluorspar as containing not over 97 percent by weight calcium fluoride, under item 522.21 TSUS. The importer claimed the merchandise should have been properly classified as containing 97 percent by weight of calcium fluoride, under item 522.23 TSUS.

To facilitate testing, samples were taken from the imported lots with some being sent to Customs for laboratory analysis, while others were retained by the importer. Customs, using its laboratory method, found the fluorspar to be under 97 percent. Evidence presented at trial, however, established that the customs chemists' description of their tests omitted some steps and deviated from others. *Aluminum Company of America*, 60 CCPA at 150, 477 F. 2d at 1398.

Plaintiff, in *Aluminum Company of America*, applied its own analysis to the merchandise which produced a result different from that submitted by the government. Plaintiff introduced evidence of tests of 10 samples made by 5 different sources, some unrelated to plaintiff, using 2 or 3 different methods, including the *exact* customs method. All of these tests found the samples to be 97 percent calcium fluoride. Additionally, the plaintiff's tests were done in three different laboratories, by three different operators, as opposed to the government's eight sample analyses, all of which were made in the same laboratory, although two chemists participated. Furthermore, the producer testified that it always produced fluorspar for the United States under specifications which required a 97 percent calcium fluoride content, and that fluorspar was a stable material that would not change during importation.

On the evidence of record, and in the absence of any substantial basis for questioning the accuracy of the plaintiff's analyses, the United States Court of Customs and Patent Appeals held that plaintiff had presented a "persuasive case." *Id.* at 152, 477 F.2d at 1400.

The plaintiff here relies on the *Aluminum Company* case for the proposition that, since it conducted its own tests and found contrary to the defendant, that it has removed or refuted defendant's presumption of correctness, and that defendant must now come forward with evidence to rebut "plaintiff's *prima facie* case."

In the present case, the defendant has not only relied on the presumption of correctness, but has also come forward with evidence in support of the customs classification. Furthermore, in view of the factual differences between *Aluminum Company of America* and this case, plaintiff's reliance on the *Aluminum Company* case is misplaced.

In the *Aluminum Company* case it was the government that deviated from the established customs method. Here, it is the plaintiff that altered the procedure. In *Aluminum Company of America*,



plaintiff introduced evidence from many sources, most of which followed the *exact* method prescribed by Customs—all yielding results favorable to the plaintiff. In the present case, plaintiff's only evidence that the motors are 1/40 horsepower are the tests performed by its own president, using its own method, rather than the method utilized by Customs and those recommended by the National Electric Manufacturing Association.

Plaintiff also submits that the government's tests of models identical to those in issue were inconsistent and conflicting. Defendant's witness, however, testified that inconsistent results are not uncommon, and that this did not imply inaccuracy. A conflict of opinion on this issue is not sufficient to hold that the method devised by the customs laboratory was not a reasonable one, or that it would not produce reasonably accurate results. See *Crown Cork & Seal Co. v. United States*, 65 Cust. Ct. 483, 497-498, C.D. 4127 (1970). As stated by the Customs Court in the *Crown Cork & Seal Co.* case:

Although plaintiff's expert used different methods \* \* \* it cannot be said that they were better or superior to the method devised at the customs laboratory. All that can be said is that each witness found some fault with the various procedures used by the other. The more serious criticism would seem to be those mentioned by the government's witness concerning the testing procedure used by plaintiff's expert.

*Id.*

The quoted statement is particularly pertinent here since the method employed by the government is based on that of the National Electric Manufacturing Association's testing procedure, and is in accordance with the dynamometer manufacturer's recommendations. Hence, the court holds that the procedure, training, and methodology of Customs was fair and reasonable.

It view of the foregoing, the court holds that the imported merchandise was properly classified as "Motors: of under 1/40 horsepower: other" under item 682.25 of the tariff schedules. Accordingly, plaintiff's protest is denied, and the action is dismissed. Judgment will issue accordingly.



# ABSTRACTED CLASS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and
C87/126	Re, C.J. August 4, 1987	Infrared Engineering, Inc.	86-8-00992	Item 712.05 13.8% or 11.9%
C87/127	Re, C.J. August 5, 1987	Hewlett-Packard Co.	84-8-01198	Item 712.05 23.1%
C87/128	DiCarlo, J. August 5, 1987	Herseus-Amersil, Inc.	80-10-01775, etc.	Item 605.05 25% 656.10 or 605.68 20%
C87/129	DiCarlo, J. August 5, 1987	North American Foreign Trading Corp.	81-1-00101, etc.	Items 715.15, 71 720.02, 720.34 720.32 Various rates
C87/130	DiCarlo, J. August 5, 1987	North American Foreign Trading Corp.	81-5-00644	Item 720.16 75¢ each + 16
C87/131	DiCarlo, J. August 5, 1987	North American Foreign Trading Corp.	82-4-00638	Items 715.05, 71 716.18, 720.24 720.28, 720.34 720.35 Various rates
C87/132	Carman, J. August 11, 1987	Mattel, Inc.	82-2-00178, etc.	Item 737.22, 16.1% Item 737.22 or 7 15.4%
C87/133	Carman, J. August 11, 1987	Mattel, Inc.	83-4-00633	Item 737.24 15.4%
C87/134	Carman, J. August 11, 1987	Mattel, Inc.	83-12-01717	Item 737.22 17.5% or 16.8
C87/135	Newman, S.J. August 11, 1987	Picker Int'l	85-6-00871	Item 413.51 15.6%
C87/136	Re, C.J. August 14, 1987	Sangamo Capacitor Division	83-7-01011, etc.	As electrical capacitors fix variable at 10
C87/137	Rao, J. August 20, 1987	Pony Sports & Leisure, Inc.	83-6-00909	Item 700.95 12.5%

# CLASSIFICATION DECISIONS

D rate	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item No. and rate		
9%	Item 712.49 6.2% or 5.5%	Agreed statement of facts	Boston Infragauges and parts thereof
	Item 712.49 5.4%	Agreed statement of facts	Philadelphia Subassemblies and parts for liquid chromatographs
	Item 685.90 8.5%	Agreed statement of facts	New York Metal contact tape or strip
16.16, 4 or us	Item 688.36 5.5% 5.3% or 5.1%	Agreed statement of facts	New York Electronic LCD or LED clocks
6%	Item 676.20 5%	Agreed statement of facts	New York Various types of clock calculators
15.15, 4, 4, or us	Item 688.36 5.1%	Agreed statement of facts	New York Electronic watches
737.24	Item A774.55 Free of duty Item 774.55 7.3% or 7.7%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
	Item A774.55 Free of duty	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
9%	Item A774.55 or A774.60 Free of duty	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
	Item 432.25 4.2%	Agreed statement of facts	Philadelphia Micropaque powder
ed or %	Item A516.94 or A656.15 Free of duty	Sangamo Capacitor Division, 779 F.2d 30 (1985)	Greenville-Spartanburg Silver mica plates
	Item 700.35 8.5%	Agreed statement of facts	New York Athletic footwear

U.S. COURT OF INTERNATIONAL TRADE

# ABSTRACTED VAL

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V87/275	Re, C.J. August 7, 1987	Puma USA, Inc.	83-7-01016	Transaction value
V87/276	Re, C.J. August 7, 1987	Puma USA, Inc.	83-8-01227	Transaction value
V87/277	Watson, J. August 12, 1987	H.W. Robinson & Co.	283424A, etc.	Export value
V87/278	Watson, J. August 12, 1987	Intermaritime Forwarding Co.	295817A, etc.	Export value
V87/279	Watson, J. August 12, 1987	United Royal Corp.	R63/11209, etc.	Export value
V87/280	Re, C.J. August 18, 1987	Mamiye Bros. Inc.	73-6-01363, etc.	Export value
V87/281	Re, C.J. August 21, 1987	Nichimen Co.	73-8-02364	Export value

# EVALUATION DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
Dutiable value as set forth on stipulated judgment	Agreed statement of facts	Los Angeles Athletic footwear
Represented by the invoiced price paid to Centrol-textil of Yugoslavia plus additions for packing	Agreed statement of facts	Los Angeles Footwear
Appraised values less 7.5% thereof	Agreed statement of facts	New York Binoculars, etc.
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Canned tuna
F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, etc.
Appraised values shown on entry papers less addition included to reflect currency revaluation	Agreed statement of facts	New York Not stated
Appraised values shown on entry papers less additions included to reflect currency revaluation	Agreed statement of facts	Portland, etc. Not stated





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